IN THE
SUPREME COURT OF THE UNITED STATES

No. 76-1053

GEORGE R. McCASLIN d/b/a The Tax Man,

Petitioner

versus

H & R BLOCK, INC.,

Respondant

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

JAY M. SAWILOWSKY
902 Georgia Railroad
Bank Building
Augusta, Georgia 30902
ATTORNEY FOR PETITIONER

TABLE OF CONTENTS

TABLE OF CITATIONS

Cases:

IN THE SUPREME COURT OF
THE UNITED STATES

CASE NO. _____

GEORGE R. McCASLIN D/B/A THE TAX MAN, Petitioner	PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT
VS.	
H & R BLOCK, INC., Respondant	

The petitioner George R. McCaslin d/b/a The Tax Man, respectfully prays that a writ of certiorari issue to review the opinion and judgment of the United States Court of Appeals for the Fifth Circuit, entered in the above case on November 4, 1976.

OPINION BELOW

The opinion of the Court of Appeals is still unreported, but is appended hereto as Exhibit A.

JURISDICTION

The judgment of the Court of Appeals for the Fifth Circuit was entered on November 4, 1976 (A). This petition for writ of certiorari is being presented within ninety days pursuant to U.S.C. 2101(c). This court's jurisdiction is invoked under Title 28 U.S.C. 2101(c).

QUESTIONS PRESENTED

1. Is the rule in Russell v. Farley, 105 U.S. 433, 26 L.ED. 1060, that when an injunction bond is filed by the plaintiff in an injunction case to obtain a preliminary injunction, the district court requiring the bond can, if satisfied that the bond is no longer equitably required, release the bond thereby relieving the plaintiff from any liability to damages, still in effect after the passage of Rule 65(c) of the Federal Rules of Civil Procedure?

2. Where Rule 65(c) of the Federal Rules of Civil Procedure states in mandatory language that the giving of security is an absolute condition precedent to the issuance of a preliminary injunction, does the district court have a discretion to mitigate or nullify that undertaking after the injunction has issued and is later determined to have been improvidently issued?

3. Did the district court, in this case, have the discretion to enter its order, after having found that the temporary restraining order was improperly issued, discharging the plaintiff from liability on its injunction bond in view of the Georgia Law and the evidence before it and without giving the successful defendant opportunity to present evidence on the issue of the plaintiff's good faith?

THE STATUTORY PROVISIONS INVOLVED

The pertinent provisions of Rule 65 of the Federal Rules of Civil Procedure, set forth in Title 28, are:

> "(c) SECURITY. No restraining order of preliminary injunction shall issue except upon the giving of security by the applicant in such sum as the court deems proper, for the payment of such costs and damages as may be incurred or suffered by any party who is found to have been wrongfully enjoined or restrained. ...."

STATEMENT OF THE CASE

George R. McCaslin d/b/a The Tax Man, petitioner, was the defendant below. H & R Block, Inc., respondant, was the plaintiff below.

In this diversity action, respondant H & R Block, Inc. brought an action in the district court seeking injunctive relief against petitioner George R. McCaslin d/b/a The Tax Man for breach of a covenant not to compete, for five years, in the tax preparation business in the area immediately surrounding Augusta, Georgia. From the beginning, petitioner George R. McCaslin took the position that the covenant against competition was unreasonable, and therefore void and unenforceable. He contended that this covenant not to compete was absolutely void under Georgia law because (1) the five year restriction against competition was for an unreasonable

length of time and (2) was unnecessarily broad in scope.

After an evidentary hearing, the district court on January 29, 1976 disregarded petitioner's contentions and entered its order granting the prayers of respondant H & R Block, Inc. for a preliminary injunction against petitioner George R. McCaslin d/b/a The Tax Man enforcing the covenant pendente lite. The injunction was conditioned upon the posting of a bond in the amount of $50,000.00 by H & R Block, Inc. in accordance with Rule 65(c), Federal Rules of Civil Procedure. The order is appended hereto as Exhibit B. H & R Block, Inc. promptly posted the bond.

On May 13, 1976, the case came on for trial before the court sitting with an advisory jury, pursuant to Rule 39(c), of the Federal Rules of Civil Procedure. At the conclusion of the evidence, argument and charge, the issues were submitted to an advisory jury upon written questions, pursuant to Rule 49(a), of the Federal Rules of Civil Procedure. The jury answered all questions in favor of the defendant petitioner.

Thereafter, on May 21, 1976, the district court entered its final judgment which approved the findings of the jury, which were (1) that five years, as provided for in said covenant not to compete, was an unreasonably long period of time to restrain competition and (2) that the covenant not to compete was unnecessarily

broad in scope, and accordingly denied the prayers of respondant H & R Block, Inc. for a permanent injunction.

Without any further hearing, the district court further in said final judgment held that the case did not present appropriate circumstances for the petitioner, George R. McCaslin d/b/a The Tax Man, to pursue damages on account of the preliminary injunction and discharged the respondant, H & R Block, Inc., and its surety, from their liability on the injunction bond. The final judgment is appended hereto as Exhibit C.

The petitioner promptly filed his notice of appeal to the United States Court of Appeals for the Fifth Circuit from that portion of the final judgment of the district court which discharged the respondant, and its surety, from their liability on the injunction bond. In the appeal, the petitioner argued that the district court was in error because:

A. The covenant not to compete was absolutely void under Georgia Law in that it was unnecessarily broad in scope in prohibiting petitioner from working in any capacity for a competing tax preparation business. He contended that the applicable Georgia Law is so well settled that H & R Block, Inc. could not have had any grounds to reasonably believe that the covenant not to compete was enforceable.

B. The evidence was overwhelming that five years was an unreasonably long period of time to restrain competition and was completely unnecessary for the reasonable, fair and effective protection of H & R Block, Inc. He contended that the evidence was so strong and so overwhelming that H & R Block, Inc. could not have had any ground upon which to reasonably believe that the covenant not to compete was enforceable.

C. The district court made a determination in final judgment that the case did not present appropriate circumstances for the petitioner to pursue damages on account of the preliminary injunction - without any further hearing. He contended that this was not fair, not equity and not warranted by the evidence in the case.

On November 4, 1976 the United States Court of Appeals for the Fifth Circuit affirmed the district court and held, citing Russell v. Farley, 105 U.S. 433, 441-442, 445, 26 L.ED. 1060 (1882), and Page Communications Engineers, Inc. v. Froehlke, 155 U.S. App. D.C. 1, 475 F. 2d 994, 997 (1973), that the awarding of damages pursuant to an injunction bond rests in the sound discretion of the court's equity jurisdiction. The court further held that there could be honest disagreement about whether or not the wording of the covenant prevented petitioner from working "in any capacity" for a competitor. In making this finding, the circuit court used the following language:

"The real question is whether the actual language of the instant provision forbids McCaslin from working 'in any capacity' for a competitor, or instead merely prevents him from entering the tax preparation business. The provision states that the employee shall not 'solicit, accept or in any way establish or engage in any business for the preparation of tax returns ...'"

The complete language of the covenant not to compete is:

"Covenant Against Competition. Employee agrees that at no time will he reveal, directly or indirectly, any confidential business information of the Company without written authorization from the Company. Employee further agrees that during the continuance of this Agreement and for a period of 5 years thereafter he will not, directly or indirectly (whether as owner, employee, agent, stockholder or in any other capacity) solicit, accept or in any way establish or engage in any business for the preparation of tax returns situated or soliciting business within an area of twenty-five (25) miles of the Branch Office without the written permission of the Company."

Finally, in its opinion the circuit court used the following language:

"Though the preliminary injunction effectively prevented operation of McCaslin's business for over a year, it was certainly not an abuse of discretion for the judge to find the suit had been brought in good faith. Further, a consideration of the equities might justifiably have led him to the informal conclusion that a year's prohibition was not unfair in the circumstances presented."

REASONS FOR GRANTING THE WRIT.

1. The judgment of the United States Court of Appeals for the Fifth Circuit:

a. Is in direct conflict with the decision in Atomic Oil Company of Oklahoma, Inc. v. Bardahl Oil Company, C.A. Okl. 1969, 419 F. 2d 1097, certiorari denied 90 S.Ct. 1500, 397 U.S. 1063, 25 L.Ed. 2d 685, decided in the Tenth Circuit, and the decision in Northeast Airlines, Inc. v. Nationwide Charters and Conventions, Inc., 1969, 413 F. 2d 335, decided in the First Circuit.

b. Overlooked the fact that the holding of Russell v. Farley, 105 U.S. 433, 441-442, 445, 26 L. Ed. 1060 (1882), was expressly predicated upon

the absence of an applicable court rule or statute and the later passage of Rule 65(c) nullified the holding in Russell v. Farley by the use of mandatory language.

c. Has decided an important question relating to practice on injunction bonds under federal law which has not been settled by this court since the passage of Rule 65(c) of the Federal Rules of Civil Procedure and which should be settled by this court.

d. Disregards the language of the covenant against competition, the applicable Georgia Law, and the evidence before the trial court in permitting a gross injustice to be perpetrated upon petitioner.

In its decision, the Fifth Circuit blindly followed the decision in Russell v. Farley, 105 U.S. 433, 441-442, 445, 26 L.Ed. 1060 (1882), and cited Page Communications Engineers, Inc. v. Froehlke, 155 U.S. App. D. C. 1, 475 F. 2d 994, 997 (1973), which did the same thing. In so doing, the circuit court disregarded the holding in Atomic Oil Company of Oklahoma, Inc. v. Bardahl Oil Company, C. A. Oko. 1969, 419 F. 2d 1097, certiorari denied 90 S. Ct. 1500, 397 U.S. 1063, 25 L.Ed. 2d 685, decided in the Tenth Circuit, which (pages 1100-1101) points out that the holding in Russell v. Farley was prior to the enactment of the Federal Rules of Civil Procedure and (on page 441 of the opinion) was

expressly predicated upon the absence of an applicable court rule or statute.

Atomic Oil Company of Oklahoma, Inc. v. Bardahl Oil Company, C. A. Oko. 1969, 419 F. 2d 1097, certiorari denied 90 S.Ct. 1500, 397 U.S. 1063, 25 L.Ed. 285, decided in the Tenth Circuit, states on page 1100 the following, which is expressly adopted by petitioner as his argument:

> "The rule set out in Russell v. Farley has been reiterated subsequent to the enactment of the Federal Rules of Civil Procedure, even though the discretion of the trial court to refuse to award damages on an injunction bond in an appropriate case has been largely circumscribed since the existence of Rule 65(c) and its predecessor, 28 U.S.C. §382. Moreover, since the holding of Russell v. Farley was expressly predicated upon the absence of an applicable court rule or statute, the presence of Rule 65(c) would seem to cast great doubt upon the continued viability of the Russell v. Farley rule in cases arising under the Federal Rules of Civil Procedure. The manifest purpose of Rule 65(c), evidenced by its plain language, strongly contraindicates the proposition that the court which issues an injunction should have

the power to foreclose recovery on the injunction bond, when such recovery devolves upon the substantive correctness of the determinations of the very same court. Rule 65(c) states in mandatory language that the giving of security is an absolute condition precedent to the issuance of a preliminary injunction. It imports no discretion to the trial court to mitigate or nullify that undertaking after the injunction has issued. It is obvious that to superimpose such a caveat on the rule would inevitably dilute the otherwise imperative application of the conditions set out in Rule 65(c), and would counteract against the interests meant to be protected by the rule."

Northeast Airlines, Inc. v. Nationwide Charters and Conventions, Inc., 1969 413 F. 2d 335 (First Circuit), 338, reversed the district court's order to release and refund the losing plaintiff's security deposit. In so doing, it referred to the language of Rule 65(c).

The petitioner respectfully submits that in view of the mandatory language of Rule 65(c) of the Federal Rules of Civil Procedure, where a district court thinks well enough of plaintiff's case to grant a preliminary injunction, upon the posting of a bond for the needed protection of the defendant, the district court should not have any

discretion to thereafter nullify the bond. If the district court has any discretion at all, it should be strictly limited to extraordinary and exceptional cases, upon notice to and hearing from the defendant. It is undisputed that the purpose of an injunction bond is to safeguard the defendant from costs and damages incurred as a result of a preliminary injunction improvidently issued. Yakus v. United States, 321 U.S. 414, 440, 64 S.Ct. 660, 674, 88 L. Ed. 834; Northeast Airlines, Inc. v. Nationwide Charters and Conventions, Inc., 413 F.2d 335 (First Circuit 1969); Sylvia Silvers v. TTC Industries, Inc., 484 F.2d 194 (Sixth Circuit 1973); Sylvia Silvers v. TTC Industries, Inc., 395 F.Supp. 1318, affirmed 513 F.2d 632. Rule 65(c).

That portion of the judgment of the district court, which is the basis of this appeal, goes directly against the express language and spirit of Rule 65(c) of the Federal Rules of Civil Procedure.

The circuit court's decision disregarded Georgia Law in its decision. First, whether or not five years is reasonable or unreasonable is a determination made by the Georgia courts under the particular facts and circumstances. Hood v. Legg, 160 Ga. 620(1) (128 S.E. 891); Orkin Exterminating Company, Inc. of South Georgia v. Dewberry, 205 Ga. 794, 807 (51 S.E. 2d 669); Preferred Risk Mutual Insurance Company v. Jones, 233 Ga. 423, 426 (211

S.E. 2d 720); Worley and Associates, Inc. v. Bull, 233 Ga. 276, 278 (210 S.E. 2d 807). Here, the evidence upon the trial of the case was that five years was an unreasonable restriction.

In holding that there could be honest disagreement about whether or not the wording of the covenant prevented petitioner from working "in any capacity" for a competitor, the circuit court disregarded the express language of the covenant and the applicable Georgia cases. In so doing, it considered only a portion of the applicable language in the covenant.

In this case, the covenant against competition contained the following language:

> "Employee further agrees that during the continuance of this agreement and for a period of five years thereafter he will not, directly or indirectly, (whether as owner, EMPLOYEE, agent, stockholder OR IN ANY OTHER CAPACITY) solicit, accept or in any way establish OR ENGAGE IN ANY BUSINESS FOR THE PREPARATION OF TAX RETURNS situated or soliciting business within an area of 25 miles of the branch office without the written permission of the Company." (Emphasis added.)

The operative words are:

> "Employee further agrees that during the continuance of this agreement and for a period of five years thereafter he will not, directly or indirectly, whether as ... EMPLOYEE ... OR IN ANY OTHER CAPACITY ... ENGAGE IN ANY BUSINESS FOR THE PREPARATION OF TAX RETURNS ..." (Emphasis added.)

The above quoted language clearly states that the defendant is absolutely prohibited from working in any capacity for a competitor of H & R Block, Inc., even in positions unrelated to trade secrets or customers. The above quoted language contains no exceptions whatsoever. Under Georgia Law, such language makes the covenant not to compete absolutely void as a matter of law because the Georgia courts hold that such a restriction is unreasonable.

The unreasonableness and illegality of the above quoted language is demonstrated by comparison with similar language held unreasonable and illegal in McNease v. National Motor Club of America, Inc., 238 Ga. 53 (Southeastern citation not yet available); Dunn v. Frank Miller Associates, Inc., 237 Ga. 266, 227 S.E. 2d 243 (1976); Dixie Bearings, Inc. v. Walker, 219 Ga. 353 (133 S.E. 2d 338); Stein Steel and Supply Company v. Tucker, 219 Ga. 844 (136 S.E. 2d 355); and Federated Mutual Insurance Company, et al, v. Whitaker, 232 Ga. 811 (209 S.E. 2d 161). Considering the construction that the

Georgia courts have given similar language, there can be no doubt whatsoever that the wording of the entire language of the covenant prevented petitioner from working "in any capacity" for a competitor.

The Court of Appeals recognized that the preliminary injunction effectively prevented operation of petitioner's business for over a year, but still said there was no abuse of discretion for the district court to have found that the suit had been brought in good faith. For the district court to have made such a finding, there must have been some facts before it upon which to exercise the discretion, if it had any. It is significant that the petitioner has never had his day in court in which to present facts going to the bad faith of the respondant. The issues in the final trial in the district court did not involve the good or bad faith of the respondant or petitioner's damages.

The circuit court finally held that, in referring to the district court, "a consideration of the equities might justifiably have led him to the informal conclusion that a year's prohibition was not unfair in the circumstances presented." Petitioner submits that is the heart of the circuit court's ruling.

The circuit court held "that a year's prohibition was not unfair in the circumstances presented." How can

that be? The covenant against competition was absolutely void! Thus, petitioner was absolutely free under the law to engage in direct head-on competition with the respondant. He was unjustifiably put out of business for over a year by an injunction action brought on a void covenant against competition. Why then can it be said "that a year's prohibition was not unfair in the circumstances presented"? It was unfair - to the petitioner.

If the decisions of the district court and of the circuit court are allowed to stand, what protection did the petitioner have? What protection would any defendant have? It would mean that the mandatory language of Rule 65(c) of the Federal Rules of Civil Procedure means nothing. It would mean that a plaintiff could, with impunity, bring an injunction case secure in the knowledge that if all did not go well, it had lost nothing, regardless of the effect on the defendant.

Petitioner asks for fair play and justice. He should have the opportunity to present evidence to a jury for its determination as to the amount of his damages. He should be permitted to try to get reimbursement for his losses and damages.

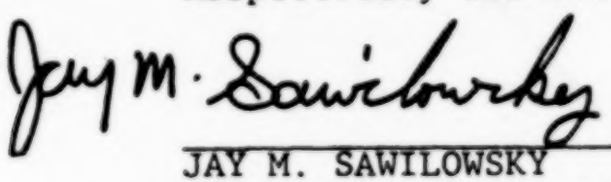
Litigants who bring injunction cases, for the purpose of preventing competition, should be reasonably certain of their position. They should

not be at liberty to take their chances, with the idea - as in this case - that they can put a competitor out of business for over a year, with impunity. It is unreasonable for litigants to expect to be rescued from the consequences of their deliberate actions by a discretion of the district court, not found in the language of Rule 65(c). The United States courts should not be the instruments of such injustice. That was not the intent of Congress as set forth in Rule 65(c).

CONCLUSION

For the foregoing reasons, a writ of certiorari should issue to review the judgment and opinion of the Court of Appeals for the Fifth Circuit.

Respectfully submitted,



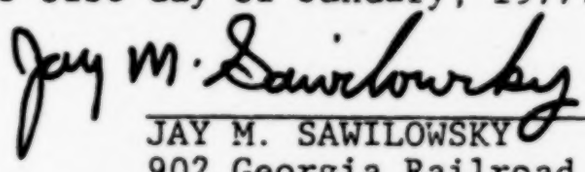
JAY M. SAWILOWSKY
902 Georgia Railroad
Bank Building
Augusta, Ga. 30902
ATTORNEY FOR PETITIONER

CERTIFICATE OF SERVICE

This is to certify that I have this day served upon opposing counsel three copies of the within and foregoing Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit by mailing three copies thereof, postage prepaid, to:

Mr. David E. Hudson
Hull, Towill, Norman, Barrett
& Johnson
Attorneys at Law
P. O. Box 1564
Augusta, Georgia 30903.

This 31st day of January, 1977.



JAY M. SAWILOWSKY
902 Georgia Railroad
Bank Building
Augusta, Ga. 30902
ATTORNEY FOR PETITIONER

EXHIBIT A

H & R BLOCK, INC., Plaintiff-Appellee
Cross Appellant,

v.

George R. McCASLIN, d/b/a the Tax
Man, Defendant-Appellant
Cross Appellee.

No. 76-2686

Summary Calendar.

United States Court of Appeals,
Fifth Circuit.

Nov. 4, 1976.

Appeals from the United States District Court for the Southern District of Georgia.

Before WISDOM, GEE and TJOFLAT, Circuit Judges.

PER CURIAM:

Plaintiff, H & R Block, Inc. (Block), is a Missouri corporation engaged in the tax return preparation business in Georgia and throughout the nation. Before defendant, George McCaslin, came to Augusta, Georgia, to become Block's City Manager for the Augusta area, he signed the contract at issue, which provided, inter alia, that employee McCaslin agreed to refrain for

a period of five years from competing with Block by establishing or engaging in any business for the preparation of tax returns. Block fired McCaslin in 1975, after he refused to accept a new contract, and McCaslin entered the tax return preparation business in the Augusta area, opening one of several offices two doors from Block's main office. McCaslin recruited a number of Block employees, and had access to a Block Policy and Procedure Manual which apparently covers most of the aspects of running a tax return preparation business. Block sued to enjoin McCaslin's business, and after posting a $50,000 bond, obtained a preliminary injunction. At the later hearing, however, the district judge determined, with the aid of an advisory jury, that the covenant against competition was void for two reasons. First, five years was an unreasonably long period of time for a restrictive covenant of that type to run. Second, the covenant was unnecessarily broad in that it prohibited defendant from working in any capacity for a tax preparation business, however minor. The judge also found that Block had sued in good faith, and since there is no liability for damages resulting from a suit for an injunction unless the injunction was obtained maliciously and without probable cause, the judge discharged Block from its liability on the injunction bond. We affirm.

McCaslin appeals from that portion of the judgment which relieved Block and

its surety from their liability on the injunction bond because Block allegedly could not have had any ground to believe that the covenant not to compete was enforceable. Further, McCaslin contends that he deserves reimbursement for damages sustained because of the wrongful issuance of the temporary injunction.

(1,2) McCaslin's assertions fail. The awarding of damages pursuant to an injunction bond rests in the sound discretion of the court's equity jurisdiction. Russell v. Farley, 105 U.S. (15 Otto) 433, 441-42, 445, 26 L.Ed. 1060 (1882); Page Communications Engineers, Inc. v. Froehlke, 155 U.S. App.D.C. 1, 475 F.2d 994, 997 (1973). Numerous extant Georgia cases dealing with covenants not to compete could create a sincere belief that the instant provision was acceptable, as the trial judge himself demonstrated by granting the preliminary injunction and noting that plaintiff had shown it was likely to prevail on the merits. Georgia courts have upheld time limits equivalent to, and even greater than, five years. See, e. g., Shirk v. Loftis Bros. & Co., 148 Ga. 500, 97 S.E. 55 (1918) (four years); Burdine v. Brooks, 206 Ga. 12, 55 S.E.2d 605 (1949) (ten years); Nelson v. Woods, 205 Ga. 295, 53 S.E. 2d 227 (1949) (five years). There seems to be little doubt, and appellant apparently does not contend otherwise, that the territorial prohibition (twenty-five miles from the Block office) is reasonable under Georgia law. See, e. g., Preferred Risk Mutual Ins. Co. v. Jones,

233 Ga. 423, 211 S.E.2d 720 (1970) (twenty-five miles); Spalding v. Southeastern Personnel, 222 Ga. 339, 149 S.E.2d 794 (1966) (thirty miles); Ogle v. Wright, 187 Ga. 749, 2 S.E.2d 72 (1939) (fifty miles). Finally, there can be honest disagreement about whether or not the wording of the covenant prevents McCaslin from working "in any capacity" for a competitor. Block does not deny, though McCaslin implies otherwise, that Georgia law holds unreasonable an employment contract which prohibits the employee, upon leaving such employment, from obtaining employment with a competitor in any capacity (for example, janitor, bookkeeper). Dunn v. Frank Miller Associates, Inc., 237 Ga. 266, 227 S.E.2d 243 (1976); Dixie Bearings, Inc. v. Walker, 219 Ga. 353, 133 S.E.2d 338 (1963). The real question is whether the actual language of the instant provision forbids McCaslin from working "in any capacity" for a competitor, or instead merely prevents him from entering the tax preparation business. The provision states that the employee shall not "solicit, accept or in any way establish or engage in any business for the preparation of tax returns . . . ." Even the district judge had difficulty interpreting this language, for he completely reversed his initial determination, found in the preliminary injunction order, that this was not a blanket prohibition against working in any capacity for a competing tax return preparation business. No less can we expect that Block might also have been unsure about the actual

effect of the words, though it bears some responsibility for adopting them. Though the preliminary injunction effectively prevented operation of McCaslin's business for over a year, it was certainly not an abuse of discretion for the judge to find the suit had been brought in good faith. Further, a consideration of the equities might justifiably have led him to the informal conclusion that a year's prohibition was not unfair in the circumstances presented.

(3) Block appeals from that portion of the judgment holding the covenant not to compete void, and denying a five-year permanent injunction. Aided by the findings of an advisory jury, the trial judge found the covenant unreasonable. That decision is not clearly erroneous.

AFFIRMED.

EXHIBIT B

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF GEORGIA
AUGUSTA DIVISION

H & R BLOCK, INC.,	*	CIVIL ACTION
Plaintiff	*	NO. 176-4
vs.	*	
GEORGE McCASLIN, d/b/a The Tax Man,	*	
Defendant	*	

O R D E R

This cause comes before the Court on the application of plaintiff, H & R Block, Inc., for a preliminary injunction enforcing against defendant, George McCaslin, a covenant not to compete in the tax preparation business in the Augusta, Georgia area.

After a hearing held in Brunswick, Georgia, on January 16, 1976, the Court took the application for a preliminary injunction under advisement. The parties have, as requested, submitted proposed findings of fact and conclusions of law.

Upon consideration, the Court concludes that the preliminary injunction must be granted pending a final hearing on the permanent injunction. In arriving at this conclusion, the Court makes the following findings of fact and conclucions of law:

Findings of Fact

Jurisdiction is based on the diversity of citizenship provisions of 28 U.S.C. §1332. The requisites for the exercise of diversity jurisdiction appear to be satisfied, and no issue has been raised as to the propriety of this Court's exercising jurisdiction.

Plaintiff, H & R Block, Inc. (Block), is a Missouri corporation engaged chiefly in the sale of its services as tax consultants and preparers of tax returns. Block does an extensive business in Georgia and has been doing business in the Augusta area for at least ten years. At the end of 1975, H & R Block, Inc., had five company-run offices in Augusta and two in the adjoining county in South Carolina. These offices were administered by the Augusta City Manager. In addition, several "satellite" offices were being run in outlying counties with some oversight from the main Augusta office. These satellites, however, are in the nature of franchises.

Defendant, George McCaslin, is a resident of South Carolina who came to Augusta in 1967 specifically to assume the duties of City Manager for the Augusta branch offices of H & R Block, Inc. At that time he signed the contract at issue in this case. That contract contained the following covenant:

"8. Covenant Against Competition. Employee agrees

that at no time will he reveal, directly or indirectly, any confidential business information of the company without written authorization from the Company. Employee further agrees that during the continuance of this Agreement and for a period of 5 years thereafter he will not, directly or indirectly, (whether as owner, employee, agent, stockholder or in any other capacity) solicit, accept or in any way establish or engage in any business for the preparation of tax returns situated or soliciting business within an area of twenty-five (25) miles of the Branch Office without the written permission of the Company. Recognizing that because of his access to confidential business information and his substantial training and experience with the Company, irreparable injury to the Company would be caused by his violation of any provision of this paragraph, employee agrees that in addition to and without limitation of any right the Company may have hereunder, any such violation shall be the proper subject matter for immediate injunctive relief."

At some point during 1975, plaintiff, H & R Block, Inc., determined that a revision of the employment contracts offered to individuals holding defendant's position was necessary. As a result, a new contract was drafted which would undoubtedly have reduced defendant's

annual income during 1976. This effect would have resulted from an alteration in the basis on which compensation was computed. Under the new contract, compensation over and above fixed salary would be computed on the basis of increase in business as well as profits. The announced purpose of this change was to increase business by boosting the incentive of area managers such as defendant to attract new business.

Defendant McCaslin, in about the spring of 1975, became aware of the proposed terms of the new contract. At that time he began to consider entering the tax preparation business on his own, and consulted with several employees of H & R Block about these plans.

When the new contract was offered to defendant, he refused to accept it, and in August of 1975 was terminated by H & R Block. He performed no further duties after that time even though he was to be paid under his old contract through December, 1975.

In January of 1976, defendant began engaging in the tax preparation business in the Augusta area. He has established offices at four locations. One location is two doors from H & R Block's main office in Augusta. Another is in the Mitchell Shopping Center in Aiken, South Carolina, where another Block office is located. Defendant has also opened two offices in J. M. Fields, Inc. stores, following the practice

originated by H & R Block of locating offices in department stores.

In setting up his business, defendant has recruited and hired a number of former H & R Block employees for the upcoming tax "season," most of whom were solicited or consulted prior to the termination of defendant's employment with Block. Defendant has also adopted the same schedule of fees used by H & R Block during the past tax season.

Tax preparation is a seasonal business requiring seasonal employees to prepare returns. The evidence shows that former customers of H & R Block have returned to Block seeking the services of tax preparers who have now been hired by defendant. The evidence also shows that of the five returns prepared by defendant's new business as of January 16, 1976, two of those were former customers of H & R Block.

The training and experience which defendant received through Block training programs and from running the Augusta branch were valuable. While with Block he was given access to a Policy and Procedures Manual which apparently covers in some detail most of the important aspects of running a tax preparation business. Defendant understandably has drawn extensively on the knowledge and experience he acquired with Block and is running his new business in substantially the same manner as he ran the H & R Block offices.

Conclusions of Law

A preliminary injunction should not issue unless a showing is made that plaintiff is likely to prevail at trial on the merits. Canal Authority v. Callaway, 489 F.2d 567, 572 (5th Cir. 1974). See generally 7 Moore's Federal Practice ¶ 65.04(1) at 65-39 (2d ed. 1975). On the facts in this case it appears clear that defendant is competing with plaintiff in violation of the terms of his contract. Thus, the likelihood of plaintiff's success turns on whether or not the covenant not to compete contained in Mr. McCaslin's employment contract was valid and enforceable.

This issue can be reduced further to whether or not the covenant in question was

> "reasonable as to time and place . . . not overly broad as to the activities proscribed, taking into consideration the interests of individuals in gaining and pursuing a livelihood, of commercial concerns in protecting property, confidential information and relationships, good will and economic advantage, and of the broader public policy favoring individual freedom to enter into contracts and to contract as one will." Durham v. Stand-By Labor, 230 Ga. 558, 560 (1973).

Considering first the requirement that the time limitation be reasonable,

that requirement appears to be met. While the bulk of the reported cases involve one or two year covenants, e.g., Preferred Risk Mutual Insurance Company v. Jones, 233 Ga. 423 (1975); Edwin K. Williams & Company - East v. Padgett, 226 Ga. 613 (1970); Baxley v. Black, 224 Ga. 456 (1968), covenants restricting competition for longer periods have also been upheld. See Mansfield v. B. & W. Gas, Inc., 222 Ga. 259 (1966); Shirk v. Loftis Brothers & Company, 148 Ga. 505 (1918). The Court concludes that the Georgia courts would not find this five-year restriction unreasonable.

As for the requirement that the activity be reasonably restricted as to place, it appears that this covenant would not be invalidated on that ground. Defendant is prohibited from soliciting, accepting or in any way establishing or engaging in any business for the preparation of tax returns "situated or soliciting business within an area of twenty-five (25) miles of the Branch Office . . . ." The Branch Office is defined in the contract as "the company's Branch Office(s) located in Augusta, Georgia (the 'Branch Office')." Thus, the area of prohibition extends outward twenty-five miles from a point or points located in or near the City of Augusta and prohibits his employment in such a business outside as well as inside that twenty-five miles if the business solicits clients within that area. This restriction is not unreasonable. See Preferred Risk Mutual Insurance Company v. Jones, 233 Ga. 423 (1975);

Spalding v. Southeastern Personnel, 222 Ga. 339, 340 (1966).

Defendant's primary attack on this covenant deals with the third requirement -- that the activity which is prohibited be reasonably restricted so as not to infringe unnecessarily on the employee's right to pursue a livelihood. Along this line, defendant argues that the covenant in this case is unenforceable because vague and indefinite

> "as to the nature, kind and character of activity the employee would not engage in and is unreasonable because of the absolute prohibition of the employee's working in any capacity for a competitor in a position unrelated to trade secrets or customers." Stein Steel & Supply Company v. Tucker, 219 Ga. 844, 846 (1964). See also Dixie Bearings, Inc. v. Walker, 219 Ga. 353 (1963).

He contends that he would be prohibited from working in any capacity in the tax preparation business, even, for example, as a janitor. This being true, he argues, the covenant must be held unreasonable under Stein Steel & Supply Company, supra, and Dixie Bearings, Inc., supra.

This contention cannot be accepted. Under the clause in question in this case, the employee agrees that he will not "solicit, accept or in any way establish or engage in any business for

the preparation of tax returns . . . ." All of the proscribed activities -- soliciting, accepting, establishing, and engaging in a tax preparation business -- are activities which this Court holds may be reasonably prohibited. In short, the prohibitions are not unreasonable because they are closely related to the protection of customers and to protection of Block from competition based on knowledge and familiarity with the manner and methods of operation of the company. See Water Services, Inc. v. Tesco Chemicals, Inc., 410 F.2d 163 (5th Cir. 1969); Baxley v. Black, 224 Ga. 456 (1968).

Even if the covenant is construed as prohibiting defendant from performing any function in a tax preparation office, the covenant on these facts would be nontheless reasonable. This case is distinguishable from the Stein Steel & Supply Company and Dixie Bearings, Inc. cases. In those cases the nature of the businesses involved was different. There, the employing companies were involved in the production and sales of hardware. A blanket prohibition there, on those facts, was much broader in practical effect than is the case here, where the business is involved in the sale of services. The Court holds that Stein Steel & Supply Company, supra, and Dixie Bearings, Inc., should be construed and confined to their respective facts. See Water Services, Inc. v. Tesco Chemicals, Inc., supra at 168-70.

In sum, the Court must conclude

that plaintiff has met the requirement of showing likelihood of success on the merits. This requirement having been met, the Court must next determine whether the balance of convenience dictates that the preliminary injunction issue.

In considering this question, the Court must weigh the threatened harm to the plaintiff against the harm the injunction may do to the defendant. Canal Authority v. Callaway, 489 F.2d 567 (5th Cir. 1974).

> "There is no absolute standard by which the discretion of a trial judge is to be guided in determining whether to grant or deny a motion for a temporary or preliminary injunction. His task is to balance the relative conveniences of the parties. If he finds that certain, immediate, and irreparable injury to a substantial interest of the movant will occur if the application is denied and the final decree is in his favor, and that injury to the opponent will be inconsiderable or may be adequately indemnified by a bond, even if the final decree be in his favor, an injunction should issue." Calagaz v. DeFries, 303 F.2d 588, 589-90 (5th Cir. 1962). See also City of Miami Beach v. Benhow Realty, Inc., 168 F.2d 378, 379 (5th Cir. 1948).

In this case, considering that defendant will be protected by a

substantial bond in an amount exceeding defendant's annual income for 1975, the balance tips in favor of granting the injunction.

Finally, the Court notes that the public interest will not be disserved by the grant of a preliminary injunction in this case. An employer has a legitimate interest in protecting itself, within reason, against a former employee's using his training, expertise, and knowledge of customers against his former employer. And further, enforcement in this case will support the "broader public policy favoring individual freedom to enter into contracts and to contract as one will." Durham v. Stand-By Labor, supra at 560.

Accordingly, it is

ORDERED that defendant, George McCaslin (whether as owner, employee, agent, stockholder, or in any other capacity) is hereby enjoined from soliciting or accepting any business for the preparation of tax returns within an area of twenty-five (25) miles of plaintiff's offices located in Augusta, Georgia.

ORDERED FURTHER that defendant, George McCaslin, (whether as owner, employee, agent, stockholder, or in any other capacity) is hereby enjoined from establishing or engaging in any business for the preparation of tax returns situated or soliciting business within an area of twenty-five (25) miles

of plaintiff's offices located in Augusta, Georgia.

The foregoing injunction is contingent upon the plaintiff's first giving bond in the sum of Fifty Thousand Dollars ($50,000) for the payment of such costs and damages as may be incurred or suffered by defendant should he be found to have been wrongfully enjoined.

This 29th day of January, 1976.

s/ Anthony A. Alaimo
United States District
Judge

EXHIBIT C

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF GEORGIA
AUGUSTA DIVISION

H & R BLOCK, INC., * CIVIL ACTION

Plaintiff * NO. 176-4

VS. *

GEORGE R. McCASLIN, *
d/b/a The Tax Man,
*

Defendant

FINDINGS AND CONCLUSIONS

In this diversity action, plaintiff seeks injunctive relief against defendant for breach of a covenant not to compete in the tax preparation business in the area immediately surrounding Augusta, Georgia. After an evidentiary hearing on January 16, 1976, this Court granted plaintiff's prayer for a preliminary injunction enforcing the covenant pendente lite.

Defendant has challenged plaintiff's right to recover on various grounds. First, he contends that the Court has no jurisdiction pursuant to 28 U.S.C. § 1332 because it appears to a certainty that the jurisdictional amount is not involved. Next, he argues that the restrictive covenant is void as a matter of law and fact because it is unreasonable as to time.

Finally, he argues that the covenant is otherwise unreasonable and an illegal restraint of trade because its restrictions are not only unnecessary for a fair protection of plaintiff's business, but also overly restrictive in the scope of activities prohibited.

On May 13, 1976, the case came on for trial before the Court sitting with an advisory jury, pursuant to Rule 39(c), Fed. R. Civ. P. At the conclusion of the evidence, argument and charge, the issues were submitted to the advisory jury upon written questions, pursuant to Rule 49(a), Fed. R. Civ. P. The import of the answers was uniformly in favor of the defendant. The questions and answers are as follows:

"1. Do you find that upon the termination of his employment with H & R Block that defendant would have a competitive impact detrimental to H & R Block if defendant were to engage in a competing tax preparation business?

No
Answer "Yes" or "No"

"2. Would plaintiff have been damaged at least $10,000 or more if the defendant had remained in a competitive business for a period of five years?

No
Answer "Yes" or "No"

"3. Under all of the facts and circumstances of this case, was the five-year restriction against competition by defendant reasonable; that is to say, do you find that defendant's ability to have a meaningful competitive impact detrimental to the interest of H & R Block by engaging in a competing tax preparation business would continue for a period of time up to five years?

No
Answer "Yes" or "No"

"4. Under all the facts and circumstances of this case, was the covenant against competition by defendant in this contract otherwise reasonable as to the activity prohibited?

No
Answer "Yes" or "No"

So say we all, this 14th day of May, 1976."

In 1967, plaintiff employed defendant as the city manager of the former's office in the Augusta, Georgia area. The employment was evidenced by a formal contract containing the following covenant:

"8. Covenant Against Competition. Employee agrees that at no time will he reveal, directly or indirectly, any confidential

business information of the company without written authorization from the Company. Employee further agrees that during the continuance of this Agreement and for a period of 5 years thereafter he will not, directly or indirectly, (whether as owner, employee, agent, stockholder or in any other capacity) solicit, accept or in any way establish or engage in any business for the preparation of tax returns situated for soliciting business within an area of twenty-five (25) miles of the Branch Office without the written permission of the Company. Recognizing that because of his access to confidential business information and his substantial training and experience with the Company, irreparable injury to the Company would be caused by his violation of any provision of this paragraph, employee agrees that in addition to and without limitation of any right the Company may have hereunder, any such violation shall be the proper subject matter for immediate injunctive relief."

The employment was terminated as of December 31, 1975, when defendant refused to sign a superseding employment contract. In January, 1976, defendant opened a competing tax preparation business in Augusta, establishing four offices in close proximity to plaintiff's offices, staffing them by proselyting plaintiff's employees.

Addressing the jurisdictional challenge, the Court finds that the jurisdictional bases are well pleaded, and that it does not factually appear to a legal certainty that the claim is for less than the jurisdictional amount. E.g., Burns v. Anderson, 502 F.2d 970 (5th Cir. 1974). Ordinarily, in actions seeking injunctive relief, the amount in controversy is measured by the value to the plaintiff of the right he is seeking to protect, even though the value of that right may not be capable of exact valuation in money. Premier Industrial Corp. v. Texas Industrial Fastener Co., 450 F.2d 444, 446 (5th Cir. 1971). See also 1 J. Moore, Federal Practice, ¶ 0.96(2) at 925 (2d ed. 1975). Indeed, it was likely that plaintiff, over a period of five years' competition, stood to lose well in excess of $10,000. "(P)laintiff need not show to an absolute certainty that the jurisdictional amount is satisfied; a present probability is sufficient." 1 J. Moore, Op. Cit., ¶ 0.92(3.-1) at 871. Accordingly, the Court finds it has jurisdiction pursuant to 28 U.S.C. §1332, and any inconsistent finding by the jury in the answer to question numbered 2 is disapproved.

The remaining findings of the jury are approved. Five years was an unreasonably long period of time to restrain competition. Such a lengthy restriction was totally unnecessary to protect plaintiff's business. Orkin Exterminating Company, Inc. of South Georgia v. Dewberry, 204 Ga. 794 (1949);

Purcell v. Joyner, 231 Ga. 85 (1973); Durham v. Stand-by Labor of Ga., Inc., 230 Ga. 558 (1973). Moreover, the covenant not to compete was unnecessarily broad in scope in prohibiting defendant from working in any capacity for a tax preparation business, whether or not his activities had any competitive effect on plaintiff's business. Such "over-kill" renders the covenant void. Dixie Bearings, Inc. v. Walker, 219 Ga. 353 (1963); Stein Steel & Supply Company v. Tucker, 219 Ga. 844 (1964); Federated Mutual Insurance Company, et al. v. Whitaker, 232 Ga. 811 (1974).

Accordingly, plaintiff's prayers for a permanent injunction must be denied.

The Court deems it appropriate and necessary to make additional findings regarding any exposure or liability on plaintiff's bond. By Order of January 29, 1976, defendant was preliminarily enjoined from competition with the plaintiff. The Court's injunction was conditioned upon the posting of a bond in the amount of $50,000 by plaintiff in accordance with Rule 65(c), Fed. R. Civ. P. Upon consideration of the evidence adduced at the preliminary injunction hearing, and also upon the trial of this case, the Court finds that the institution of this action by plaintiff and plaintiff's presentation of evidence by which the preliminary injunction was issued was in good faith and based upon a reasonable expectation that plaintiff would prevail

upon the merits of the case. Final disposition of the case was pursued by the Court and both parties without undue delay and without the concealment of pertinent facts needed for a determination of the cause.

Accordingly, this case does not present appropriate circumstances for the defendant to pursue damages on account of the preliminary injunction from which it will now be relieved. The awarding of damages pursuant to an injunction bond is a matter resting in the sound discretion of the court. Russell v. Farley, 105 U.S. 433, 26 L.Ed. 1060 (1882). Moreover, there is no liability for damages resulting from a suit for an injunction or an injunction erroneously granted unless the suit was brought and the injunction obtained maliciously and without probable cause. Greenwood County v. Duke Power Company, 107 F.2d 484 (4th Cir. 1939), cert. denied 309 U.S. 667 (1940); 7 J. Moore, Federal Practice, ¶ 65.10(1), n. 9. Plaintiff and plaintiff's surety are, therefore, discharged from their liability on the injunction bond.

The Clerk is directed to enter a judgment dismissing the complaint at plaintiff's costs.

So ordered, this 21st day of May, 1976.

s/ Anthony A. Alaimo
United States District Judge